IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10076 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AMIN KALABHAI KURESHI BROTHER OF DETENU MOHD. HANIF @ KALA

Versus

COMMISSIONER OF POLICE

Appearance:

MR NM KAPADIA for Petitioner

MR KT DAVE, AGP, for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 18/04/2000

ORAL JUDGEMENT

1. Commissioner of Police, Surat City, Surat, passed an order on November 25, 1999, in exercise of powers under Section 3(1) of the Gujarat Prevention of Anti-Social Activities Act, 1985 ("PASA Act" for short), detaining Mohmad Hanif @ Kala Hussainbhai Kureshi of Nanpura, Surat, under the provisions of the said Act.

2. The detaining authority took into consideration two offences registered against the detenu under Bombay Prohibition Act. The authority also considered the statements of two anonymous witnesses. According to the authority, the activity of the detenu is that of a bootlegger and is detrimental to public order. The authority was satisfied that the witnesses suffered from genuine fear from the detenu in respect of their person and property and, therefore, powers under Section 9(2) of the PASA Act are required to be exercised by not disclosing identity of the witnesses. The detaining authority considered the possibility of resorting to less drastic remedies under ordinary laws and came to conclusion that in order to immediately prevent the detenu from pursuing his illegal and anti-social activities, detention under PASA Act is required to be resorted to.

3. The petitioner, who is the brother of the detenu, has challenged the order of detention by this petition on various grounds. However. Mr. Kapadia, learned advocate appearing for the petitioner, has restricted his arguments to the ground of non-consideration of a representation made on behalf of the detenu by the petitioner in its proper perspective. He submitted that a representation was made by the petitioner-brother of the detenu on December 11, 1999. That representation was supported by an affidavit sworn by the petitioner. The Government, by communication dated December 21, 1999, communicated to the detenu that the representation made by his brother to the Minister of State (Home) is rejected by the Government, after due consideration. Mr. Kapadia, therefore, urged that the authority does not seem to have considered the representation in light of the affidavit. There does not appear any exercise to have been undertaken by the Government while considering the representation in light of the affidavit of the petitioner. No steps seem to have been taken to verify about the correctness of the affidavit of the petitioner or the statements of the anonymous witnesses. Mr. Kapadia, therefore, submitted that the representation, though verbally said to have been rejected after due consideration, is not considered in proper perspective and, therefore, it is not consideration at all. The right of the detenu, therefore, of making an effective representation is infringed and the continued detention, therefore, would be rendered bad in law. Mr. Kapadia, therefore, urged that the petition may be allowed and the order impugned may be quashed and set aside.

4. Mr. K.T. Dave, learned Assistant Government Pleader, has opposed this petition. On being asked pointedly, after referring to the files, he states that there does not appear to be any exercise undertaken for verifying the correctness of the affidavit of the petitioner (brother of the detenu) in contrast to the allegations made in the statements of anonymous witnesses. However, he tried to submit that the appropriate authority of the Government has rejected the representation after due consideration and, therefore, the Court may not entertain this petition.

5. Having regard to rival side contentions, the fact that emerges, without any dispute, is that a representation was sent on behalf of the detenu by the petitioner-Mohmad Amin Kalabhai Kureshi on December 11, 1999, which was addressed to the Home Minister, at Gandhinagar. The said representation was accompanied by an affidavit filed by the petitioner, wherein he stated that no incidents as alleged in the statements of the anonymous witnesses were found to have occurred, on his personal inquiry in that area. The said representation is rejected by the Government by one line communication stating that the representation made by the brother of the detenu to "Honourable Minister of State (Home)" dated 11.12.1999 is rejected by the Government after consideration.

6. In the first instance, at a glance, the return communication from the State Government reflects non-application of mind. The representation was addressed to the Home Minister and not to the Hon'ble Minister of State, as is stated in the communication to the detenu.

7. Apart from the above aspect, another aspect that requires consideration is whether the Government can be said to have considered the representation in its proper perspective. The detenu had a right of making an effective representation guaranteed under the Constitution [Article 22(5)]. It is expected of the Government to afford the detenu an earliest opportunity of making a representation against the order and the very purpose behind providing this right is that the Government may reconsider the decision of detaining the detenu in light of the representation. The right of making a representation is not given to the detenu for mere mechanical rejection by the appropriate authority without considering the points raised in the representation. No affidavit in reply is filed either on behalf of the Government or by the detaining authority

and, as is stated in all fairness by the learned Assistant Government Pleader, no exercise is undertaken by the Government to ascertain as to whether what is stated in the affidavit is correct or not. No attempt is made to cross-check the contents of the affidavit, particularly when they contradict the statements of anonymous witnesses, which form basis of the order of detention. Making of representation is not an empty formality provided by the Constitution. The authority concerned is expected to perform its duty with all seriousness and sincerity at its command. Such mechanical approach in considering the representation would result in to rendering the provisions of Article 22(5) as non-existent. Mechanical rejection of representation amounts to denial of right of making a representation guaranteed under the Constitution. This in itself is sufficient to hold that the continued detention is bad in law. The petition deserves to be allowed on this ground alone.

8. In view the above discussion, this petition is allowed. The impugned order of detention dated 25th November, 1999, passed against the detenu is hereby quashed. The detenu-Mohmad Hanif @ Kala Hussainbhai Kureshi is ordered to be set at liberty forthwith, if not required in any other matter. Rule is made absolute with no orders as to costs.

[A.L. DAVE, J.]

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